

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,) 07-CR-550-3
)
 vs.)
)
KABONI SAVAGE, a/k/a JOSEPH)
AMILL, a/k/a BONNIE, a/k/a)
YUSEF BILLA,) Philadelphia, PA
) September 30, 2010
 Defendant.) 3:06 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (The following was heard in open court at 3:06 p.m.)

2 THE COURT: Please have a seat. All right, we have
3 the case of the United States versus Kaboni Savage. It's
4 number 7-550. Counsel, please identify yourselves.

5 MR. TROYER: Good afternoon, Your Honor, David
6 Troyer and Christine Sykes, Assistant US Attorneys for the
7 Government, and we're accompanied today at counsel table of
8 course by FBI Special Agent Kevin Lewis.

9 MS. SYKES: Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 MR. HOEY: Good afternoon, sir, Christian Hoey and
12 Timothy Sullivan on behalf of Kaboni Savage, here as well with
13 one of Mr. Sullivan's associates.

14 THE COURT: All right.

15 MR. SULLIVAN: Good afternoon, Your Honor.

16 THE COURT: Good afternoon. Counsel, we're here --
17 there are three matters that we need to address. The first
18 matter, Mr. Hoey, I received a letter from your client and I
19 sent a copy of that letter to you. We're treating it as a
20 motion. He registered some concern about the representation
21 he was getting. Have you had a chance to talk to your client
22 about this?

23 MR. HOEY: Yes, sir. I have received it from the
24 Court. I reviewed it personally as well with my client. My
25 client has indicated that he wishes to withdraw that motion

1 today, Your Honor.

2 THE COURT: Is that correct, Mr. Savage?

3 THE DEFENDANT: Yes.

4 THE COURT: You're satisfied with Mr. Hoey's
5 representation?

6 THE DEFENDANT: Yes.

7 THE COURT: Mr. Sullivan's representation?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. And you want to -- you want
10 the Court to mark this motion withdrawn?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right, we will do that. The next
13 item of business, there has been a joint motion to continue
14 filed in this matter. The defendants requested that this case
15 be continued. It's scheduled now for trial in March and there
16 are other dates already on the schedule for different
17 deadlines. Mr. Hoey, you're requesting an extension or a
18 continuance for 180 days, is that -- is that what you're
19 requesting --

20 MR. HOEY: It is, Your Honor.

21 THE COURT: -- of all the deadlines?

22 MR. HOEY: Yes, joint through the other attorneys
23 for the other defendants, yes. We have reviewed that concept
24 with Mr. Savage, Mr. Sullivan and I that is, and he is in
25 agreement with that as with me, Your Honor, and we'd have no

1 objection to the Court issuing an order extending the
2 deadlines and continuing the case.

3 THE COURT: This matter was declared complex. There
4 is a great deal of work that is going to go into preparing
5 this case for trial. Mr. Troyer, does the Government have any
6 position with regard to that?

7 MR. TROYER: No, we have no objection to the
8 granting of the motion.

9 THE COURT: All right. Mr. Savage, we've been
10 talking about this request for continuance. Your attorney --
11 your attorneys have asked for an extension of time, another
12 180 days to get this case ready for trial. It's scheduled for
13 trial in March now, they want to move that trial to September.
14 You've talked to them about that?

15 THE DEFENDANT: Yes.

16 THE COURT: You're in agreement with that request?

17 THE DEFENDANT: Yes.

18 THE COURT: Even though that request delays the
19 trial, you think it's in your own best interest to do that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Counsel, we will grant that
22 joint motion for a continuance and we will enter an order
23 scheduling the matter in accordance with that motion.

24 Okay, finally there is a motion for relief from the
25 Special Administrative Measures. Mr. Hoey and Mr. Sullivan,

1 you filed this motion, the Government has responded to it and
2 I will hear whatever you wish to present with regard to that
3 motion.

4 MR. HOEY: Yes, Your Honor. If the Court pleases,
5 in terms of presenting the argument, I would ask the Court to
6 consider a couple of different things. If I may approach?

7 THE COURT: Yes.

8 MR. HOEY: With respect to the precedent already
9 involved in this case in terms of modifying terms of
10 confinement, I would argue the first issue that's on the table
11 today is whether or not this case is in the right place in
12 front of the right Judge and under the right circumstances,
13 quite frankly.

14 The Government has argued in their response that the
15 defendant has not exhausted his administrative remedies
16 through the ARP process which is outlined in the regulations
17 and that this matter is not ripe, nor should it be before Your
18 Honor and it should be summarily dismissed.

19 I think that is the first issue that I would like to
20 discuss with the Court. I think there is a case history
21 involving this Court and Mr. Savage and the conditions of
22 confinement that establishes somewhat of a precedent that this
23 Court can rely on in terms of agreeing to handle this
24 particular issue or issues that we've presented in this
25 motion.

1 Particularly, Your Honor, the defendant, as you may
2 recall, was transferred from ADX, Colorado to The Metropolitan
3 Correctional Center at the request of former counsel. The
4 request essentially was based upon former counsel's inability
5 to get the Colorado and effectively prepare for trial, and I
6 believe that upon application to this Court, that condition of
7 confinement -- meaning his situation in Colorado, was altered
8 to allow him to go to New York, closer to counsel, Mr. Warren,
9 in order for him to effectively prepare. So that is one
10 condition that's already been modified, so to speak.

11 The second condition, the Court will recall Mr.
12 Sullivan's request to allow personal contact with Mr. Savage
13 in terms of preparing for trial and this Court modified
14 further the conditions of confinement to allow Mr. Savage to
15 come from MCC in New York down to the FDC two days per month
16 for personal contact visits which would enable counsel and the
17 defendant to exchange paperwork and have meaningful
18 communications.

19 The third element of modification, if you will, I
20 think was really done orally at the request of Mr. Sullivan
21 back in February of this year wherein Mr. Sullivan had
22 discovered that various pieces of communication and
23 correspondence that he had sent to Mr. Savage had been opened
24 by prison officials outside the presence of the inmate,
25 despite the fact that the envelope and the letters were

1 conspicuously marked with the proper language required by the
2 BOP that this was in fact attorney correspondence, that it
3 should be opened in front of the inmate, and none of those
4 steps were taken.

5 This Court admonished the Bureau to follow the
6 guidelines and not to open mail outside the presence of the
7 inmate. So there exists already a history within this case,
8 Your Honor, of modification of the terms of confinement that I
9 would argue that establishes enough precedent for this Court
10 to adopt this particular petition, and then hear the
11 substantive elements of it in an evidentiary hearing.

12 So that's the first response that we would have to
13 the Government's position that it should be dismissed without
14 hearing on the merits.

15 The second argument concerns simply the law, Your
16 Honor, and the law we believe in this particular case happens
17 to fall -- this particular case happens to fall squarely
18 within well-established precedent in the Southern District of
19 New York in several different cases, clearly establishing a
20 precedent where a defendant waiting trial can challenge the
21 terms of his confinement and challenge those terms with his
22 Trial Judge in the particular district for which he's being
23 prosecuted.

24 In Basciano, the Eastern District of New York
25 decided in 2008, heard a petition that was filed by the

1 defendant in that particular case challenging -- making
2 similar challenges to what Mr. Savage is challenging in this
3 particular case. Mr. Basciano, the defendant in that matter,
4 challenged his ability to contact counsel. He made First
5 Amendment arguments in his petition and the District Judge
6 hearing his underlying criminal case actually adopted that
7 particular motion that was filed within that criminal case and
8 heard it, heard the substantive elements of it.

9 Therefore, we would ask the Court to consider that
10 holding, which again is a 2008 holding. The same district in
11 Hashmi was another matter which we've cited in our brief, is
12 another case where the District Judge adopted a motion filed
13 within the criminal prosecution by Defendant Hashmi and
14 although it was not couched in terms of a 1983 action or under
15 any type of civil complaint, he filed it directly as a motion
16 within the criminal complaint -- the criminal case. The Court
17 heard it.

18 The Court got over the first step of has the
19 defendant exhausted his remedies -- his administrative
20 procedure remedies, has the defendant properly placed the
21 matter before the Trial Judge and in Hashmi, the Court
22 concluded that there is no exhaustion prerequisite, similar to
23 the way the Basciano Court ruled that there is no exhaustion
24 requirement, the matter is ripe automatically and that that
25 Court had heard that case without requiring the defendant to

1 exhaust any administrative remedy procedures.

2 Finally, in US versus Lopez, Your Honor, a similar
3 case raised within the confines of the criminal case, that
4 Court found that the PLRA exhaustion requirements were not
5 related to a motion filed by the defendant in a criminal case.
6 So I think within this particular case this Court has
7 established a precedent of modifying terms of conditions.

8 Secondly, there is well-established precedent where
9 criminal defendants have filed motions within their criminal
10 cases and have been heard directly by their Trial Judges in
11 the three cases that we've mentioned, all of which are cited
12 in our brief.

13 And finally, Your Honor, I think it's an interesting
14 point to note but should be noted nonetheless, and that is
15 that the administrative remedies that are found in 28 CFR
16 501.3 and later in 28 CFR 542.10 and the following subsections
17 of that all suggest that this is not -- this concept of
18 exhaustion is not a prerequisite to getting this matter before
19 a Judge.

20 Quite frankly, they also suggest in 501.3(e), Your
21 Honor, that the affected inmate may seek review of the terms
22 of confinement through this ARP process. It doesn't make it
23 mandatory, it doesn't say shall or must proceed in that
24 manner. These administrative remedy procedures are simply
25 available to an inmate such as Mr. Savage.

1 We'll get into the steps that he did take to
2 challenge the terms of confinement, but there is this idea
3 that the Court is being asked to accept that the defendant
4 should somehow exhaust these remedies and these procedures
5 prior to being heard by this Court and I don't think that
6 that's correct.

7 I think most importantly, Your Honor, the Court
8 should understand clearly that despite these procedures
9 existing and outlined in 542.10 and the subsequent sections,
10 the Attorney General is the only person that can modify the
11 terms of confinement upon a request made by the inmate, that
12 this procedure that the Bureau of Prisons has established
13 through the regulations is a road to nowhere.

14 In essence, the inmate is being required to file
15 petition after petition after petition to various people
16 within the BOP where the BOP is essentially telling Mr. Savage
17 in various responses, hey look, even if we felt these
18 suggestions had merit, there's nothing we can do about it
19 anyway. The Attorney General is the only person that can
20 modify the SAMs.

21 And despite those requirements and despite the
22 suggestion to the Court that he is to exhaust this
23 administrative remedy procedure, there's really no hope within
24 that procedure for Mr. Savage. Even if there are merits to
25 his complaints, this process that's in place goes nowhere for

1 him. So for all of those reasons, I would ask the Court
2 simply on argument to find that it does have jurisdiction over
3 the substantive element of Mr. Savage's petition.

4 THE COURT: All right.

5 MR. HOEY: If the Court wishes testimony in
6 evidence, we're prepared to present that but I think the
7 argument, I'd like to lay out first, Your Honor.

8 THE COURT: Mr. Troyer?

9 MR. TROYER: Yes, thank you, Your Honor. Your
10 Honor, there's a statute, the Prisoner -- Prison Litigation
11 Reform Act, which requires inmate plaintiffs to exhaust their
12 administrative remedies with the Bureau of Prisons before
13 seeking redress from the Courts.

14 This is not a road to nowhere, I think is somewhat
15 of a -- well, it's not a correct argument and the proof is in
16 the pudding because we've had instances in this -- in this
17 case where redress has been sought informally and with our
18 office being involved and with the Bureau of Prisons being
19 involved -- the regional office.

20 We have made -- we have made changes to the
21 implementation of the SAMs, we have made changes to the
22 conditions of confinement so it's hardly a road to nowhere.
23 It is in fact something which is required. I mean, the Act
24 clearly states, "No action shall be brought with respect to
25 prison conditions under Section 1983 of this Title or any

1 other Federal law by a prisoner confined in any jail, prison
2 or other correctional facility until such administrative
3 remedies as are available are exhausted." And again, that's
4 Title 42, Section 1997e, subsection (a).

5 Mr. Savage of course is a pretrial detainee. He's
6 also a sentenced prisoner. He's already been convicted of
7 witness tampering crimes -- he's -- as well as drug
8 trafficking crimes. Those convictions were recently confirmed
9 on appeal by the United States Court of Appeals for the Third
10 Circuit.

11 Of course there are some cases -- Mr. Hoey has set
12 forth a few cases -- District Court cases where District
13 Courts came to the conclusion that an exhaustion of remedies
14 -- exhaustion of administrative remedies was not required,
15 however, there are many more cases including Third Circuit
16 case law that says that in fact the PLRA does have to be
17 upheld, that a prisoner does have to exhaust administrative
18 remedies.

19 And of course I've set them out in my -- in my
20 response. I won't go through each one but the -- we have the
21 Eastern District of Virginia in United States versus Ali, the
22 Southern District of New York in United States versus Elmari
23 (phonetic), United States versus Troya -- that's T-R-O-Y-A --
24 from the Southern District of Florida, and the United States
25 versus Antonelli, which is a Seventh Circuit case.

1 In the Seventh Circuit case, the defendant there did
2 something similar -- not exactly the same but similar to what
3 Mr. Savage is doing which is instead of filing a civil action
4 or seeking redress under 1983, he filed it under a criminal
5 case. The only difference there -- and I'll admit, there is a
6 difference -- was that the criminal case then was at that time
7 dormant.

8 But he filed it in the criminal case hoping to avoid
9 this whole exhaustion of remedies. The Seventh Circuit told
10 him he can't do that. In fact, the Seventh Circuit, there's
11 an interesting quote from that opinion at page 362 of that
12 opinion where they say, "Prisoners who play games to avoid the
13 PLRA should not expect Courts to cooperate," and indeed,
14 that's -- that's really the situation here.

15 Mr. Savage has some very distinct issues that he has
16 raised, and I'm not saying that all of those issues don't need
17 to be entertained, because they do. Each and every one should
18 be listened to and they should -- but they should be listened
19 to and entertained through the administrative process first.
20 Mr. Savage is well aware of this process.

21 Before I get to that, I just want to -- I don't want
22 to forget to mention the Third Circuit case law in this which
23 is well established, it goes back at least to 1988 in Lyons
24 versus U.S. Marshals. The Third Circuit specifically ruled
25 that a pretrial detainee litigant who was under SAMs

1 restrictions must exhaust his administrative remedies unless
2 the prisoner is seeking only money damages, which of course is
3 not the case in this instance. So there's Third Circuit case
4 law that is I think directly on point and controlling in this
5 case.

6 I recognize the Hashmi decision that was a District
7 Court opinion in the Southern District of New York in 2008,
8 however, I also pointed out in our response that there's some
9 question about the viability of that decision. Nowhere in
10 Hashmi did they discuss the Nagy situation -- the Nagy
11 decision from 1996 which is a Second Circuit decision where
12 the Court applied the PLRA to a motion filed by a criminal
13 defendant and explained that what constitutes a "civil action"
14 for the purposes of the PLRA depends on the substance of the
15 prisoner's claims.

16 Plus, if he's seeking comparable relief to what
17 might be afforded in a traditional suit under 1983 the PLRA
18 still applies, and that's really what this is. This is
19 undoubtedly -- this is all about conditions of confinement.
20 Mr. Savage has some arguments about the conditions of his
21 confinement and how they impact some of his other
22 constitutional rights, specifically his Sixth Amendment right
23 to counsel in preparing for trial.

24 But, they are nevertheless conditions of confinement
25 arguments and he has to go through that exhaustion of

1 administrative remedies. Now, what I'd like to do at this
2 point is to kind of focus or crystallize the issue because --
3 and I don't know that I did that appropriately in my response
4 because Mr. Savage has filed -- has taken different steps at
5 different times and he has filed different pleadings in
6 different forums.

7 And what he has done, there was a previous request
8 to -- for BOP to eliminate or lift the SAMs conditions. He
9 did file that. He filed that request for administrative
10 remedies when he was in ADMAX in Colorado and he appealed
11 that, the denial of his request, to the local warden and he
12 appealed the denial of that request to the Regional Office of
13 the Bureau of Prisons.

14 And once that was denied, he appealed it to the
15 Central Office of the Bureau of Prisons, after which he filed
16 a suit. That suit was dismissed. It was dismissed without
17 prejudice, but it was dismissed. So he's familiar with the
18 requirements of exhausting administrative remedies. He has
19 fulfilled -- in that case he fulfilled those requirements.

20 What we have here though before us today I submit is
21 really something a little bit different. What he is filing
22 now today is he's asking for lifting of the SAMs restrictions,
23 but he's also -- he's asking for it for specific reasons and
24 he's asking for specific redress for specific instances which
25 didn't even exist back when he filed his suit in Colorado, so

1 and for those, he has not exhausted his administrative
2 remedies.

3 And again, just so the record is clear -- and all of
4 these I believe are in the submissions given mostly by defense
5 counsel who did file a rather comprehensive submission to the
6 Court, but just for clarity purposes, April 28th, 2010, Mr.
7 Savage filed a request -- a somewhat informal request for
8 administrative remedies regarding his so-called dry cell in
9 FDC Philadelphia.

10 Basically that was a complaint that when he was
11 brought down for his April 21st, 2010 meeting with counsel --
12 contact visit with counsel that he was placed in a cell that
13 Mr. Savage felt was not adequate for his needs. There is a
14 response filed to that request on May 20th, 2010.

15 Mr. Savage then sought an appeal of that and he
16 filed a formal request for administrative remedies at MCC New
17 York on May 27th, 2010, and on June 15th, 2010, he received a
18 response from the Warden of MCC New York. With regard to
19 that, that is where Mr. Savage's pursuit of those issues
20 ended. Mr. Savage never filed any appeal with the Regional
21 Office of BOP, never followed up, never sought any appeal
22 anywhere.

23 Of course Mr. Savage again is well aware of the
24 procedures because he followed the procedures in his previous
25 suit in Colorado. He knew that he could file an appeal with

1 the BOP Regional Office and if that was denied, he could file
2 an appeal to the Central Office. Indeed, again, he had done
3 those before. In this case, he did not do these. Essentially
4 to crystallize the issue, Your Honor, defense can't have it
5 both ways.

6 Either this is the same complaint he listed in
7 Colorado in which case his complaint was dismissed and if he
8 wishes to, he could follow up and try to re-file it in the
9 District of Colorado, or it's a different complaint, and I
10 submit that it probably -- admittedly probably is a different
11 complaint. And if it's a different complaint for different
12 specific perceived transgressions and for specific different
13 remedies, then he has to file the administrative remedies.

14 And now counsel, again, referred to this road to
15 nowhere. It's a somewhat -- not only is it a somewhat
16 insulting argument, but it's really not accurate and again,
17 this case is a good example of how it's not accurate. You
18 know, Mr. Hoey has -- or rather Mr. Savage placed in his
19 motion, you know, certain -- you know, certain complaints and
20 one of those complaints involved for instance his legal mail.

21 There was some arguments that his legal mail had
22 either been opened or had been returned to counsel. I don't
23 know of any situations where it was opened, however, there
24 were admittedly when I viewed what was given to us by Mr. Hoey
25 in the appendix or attachment, I saw that certain things had

1 been returned to counsel which at least to me looked like they
2 were attorney -- attorney-client envelopes that should have
3 been delivered to Mr. Savage.

4 We followed up with this. We followed up with the
5 head of the SAMs Unit in MCC New York, Mr. Haas, who is
6 extremely -- you know, communicative and extremely involved in
7 this case and has been very receptive to both input from the
8 Government and defense counsel, and we followed up with the
9 Regional Office of the BOP and as a result, we obtained some
10 changes to this.

11 In fact, I just received this week advice that they
12 are going to relax some of their standards. Now, if the Court
13 were to look at these -- and I don't suggest that the Court
14 really needs to delve into the minutia of this, in fact,
15 obviously we're arguing that you don't because he hasn't
16 exhausted the administrative remedies.

17 But this is a good example of why he should exhaust
18 administrative remedies and why a lot of these things could be
19 handled either informally or through the Bureau of Prisons
20 administratively and don't have to essentially -- pardon the
21 expression -- bother the Court with these matters, is that --
22 you know, some of the envelopes that were sent, say for
23 instance from Mr. Hoey's office, one of -- some of -- a couple
24 of those envelopes didn't have Mr. Hoey's name on it, didn't
25 have a law office name, it simply had the address.

1 I think it's 50 Darby Road, Paoli, PA. That was
2 obviously an oversight by somebody and I'm not suggesting --
3 certainly not suggesting Mr. Hoey did it on purpose. He
4 probably gave it to a legal assistant, she probably put it in
5 an envelope and sent it out without really looking at it. So
6 when somebody receives the mail at MCC New York, they don't
7 know who this is coming from and so they sent it back.

8 That's actually legitimate, and Mr. -- you know,
9 defendant's counsel do have some obligation to make sure that
10 things that are sent to their clients in the institutions are
11 correctly marked. They should be marked either legal mail or
12 special mail, they should be marked with their law office or
13 the fact that they're attorneys at law.

14 There were a couple of other instances I will tell
15 you where it appeared -- especially I think there were a
16 couple of things from Mr. Sullivan's office where it appeared
17 that they really should have gone through and been given to
18 Mr. Savage. We had that discussion.

19 I don't bring this out to air the dirty laundry and
20 I certainly don't bring it out to criticize MCC New York and I
21 certainly don't bring it out so that we can pat ourselves on
22 the back or that I can congratulate -- you know, BOP Regional
23 Office for assisting.

24 My point is that this could easily -- this didn't
25 require a one-inch thick pleading with a one-inch thick or a

1 half-inch thick pleading with a one-inch thick attachment.
2 All it required was basically a phone call saying hey Dave,
3 this stuff isn't getting through, can you help us, or, even a
4 call to Mr. Haas or to Regional with counsel saying hey, we're
5 having some issues about the mail being delivered correctly,
6 can you intervene and make sure that this gets done. Had that
7 happened, it would have gotten done.

8 If for some reason all of us were either asleep at
9 the switch or not -- not doing our jobs correctly at that
10 point, certainly Mr. Savage could have asked for
11 administrative remedies. Had he done that and had it gone to
12 the BOP Regional Office, that matter would have been
13 corrected, so it's a perfect example of how this is not a road
14 to nowhere and how if Mr. Savage just simply followed the
15 procedures of which he is well aware, we wouldn't be in this
16 position.

17 What Mr. Savage is asking for -- and I know the
18 Judge -- Your Honor doesn't necessarily want to get to the
19 merits of this, we want to deal with the exhaustion issue
20 first, but essentially Mr. Savage has some very limited and
21 specific complaints which might require or at least if he's to
22 be believed, limited and specific actions by somebody.

23 However, it certainly doesn't require the lifting of the
24 SAMs motion and in this case, the SAMs motion is issued by the
25 Attorney General, just to address I think counsel's last

1 point. However, it's issued by the Attorney General to be
2 implemented by the Bureau of Prisons and there is some rather
3 considerable latitude of discretion within the Bureau of
4 Prisons as to how that SAMs is implemented and the example I
5 just gave the Court I think is a perfect example of how the
6 Bureau of Prisons does have discretion and can adequately deal
7 with whatever issues concerning conditions of confinement that
8 the defendant raises.

9 THE COURT: All right. Mr. Hoey?

10 MR. HOEY: Your Honor, in response, I think that the
11 letter -- the correspondence concern is something that's kind
12 of vital to our ability to actively and effectively defend our
13 client and I think it's important that it was brought up
14 because quite frankly, when I was in the MCC last week I
15 received -- or I saw my client receive a letter that was
16 completely obvious to be legal mail through the slot in his
17 door, which was opened.

18 And I got the letter from him and I brought it
19 today, and that letter is postmarked September 3rd of 2010 and
20 it says on there, "Special mail, open in the presence of the
21 inmate, Timothy J. Sullivan, Esquire," who is clearly on
22 record at the prison as being co-counsel in the case. That is
23 the fifth piece of mail that Mr. Sullivan has so marked that
24 has been opened in advance of being distributed to my client,
25 and my client did informally challenge that when I left the

1 prison that day, two weeks ago.

2 And when he asked the person who delivered the mail
3 to him why it was that they were invading the -- the
4 communications between counsel and himself, he was told by the
5 gal at the prison that this is the way we do it at the MCC and
6 you're going to have to deal with it.

7 And I can't conceive of a more egregious misstep and
8 more egregious amount of arrogance in a facility that's
9 housing somebody in conditions that are deplorable, quite
10 frankly, to open their mail, stiff-arm them and tell them that
11 that's the way it's going to be in a capital case where he's
12 facing the death penalty, dealing with two separate counsel,
13 the taxpayers are footing the bill, and now I have lost all
14 confidence in the ability to communicate with my client
15 through the mail because I have no idea what they're doing to
16 my mail prior to delivering it to my client.

17 And quite frankly, Your Honor, it's in affront to
18 our ability to represent him effectively, and it is not
19 getting better and this mirage that exists through this
20 administrative remedy procedure is exactly that.

21 THE COURT: Well, let's -- let's cut through it, Mr.
22 Hoey. With regard to that administrative remedy procedure,
23 will you agree that it has not been exhausted? I mean, we can
24 get to the merits of the situation in a few minutes, but it
25 seems clear to me --

1 MR. HOEY: Here's how I would address --

2 THE COURT: -- it seems clear to me that the
3 argument that you're making is it's an exercise in futility,
4 not that it was pursued.

5 MR. HOEY: No, in fact, I'm not, Your Honor. What
6 I'm saying, and I think the Government would agree that at one
7 point in time when Mr. Savage was housed at ADX in Colorado,
8 he did exhaust his administrative remedies. Now, it's -- it's
9 kind of interesting to say well, we slightly tweaked the SAMs
10 when he went to New York, so you know what? This guy's got to
11 start the whole process all over again because we're now
12 allowing him to get a newspaper every third week.

13 THE COURT: Are you suggesting that what happened in
14 Colorado will take care of all problems in the future?

15 MR. HOEY: Well, I think what happened in Colorado
16 is important because the core SAMs restrictions on Mr. Savage
17 have never changed. In fact, 99 percent of the SAMs
18 restrictions never changed when he went from Colorado to New
19 York.

20 THE COURT: Well, did you in Colorado make
21 objections to counsel's ability to communicate with him?

22 MR. HOEY: I was not counsel of record at that
23 point, Your Honor. I --

24 THE COURT: Well, did anyone?

25 MR. HOEY: I -- yes, I think Mr. Warren, the

1 previous attorney.

2 THE COURT: And that went through the administrative
3 process all the way to the end?

4 MR. HOEY: I don't think it did. I think what my
5 client had raised there in Colorado was simple concepts that
6 are again contained in his petition for the Court such as his
7 ability to communicate with counsel, ability to communicate
8 with his family, First Amendment concerns.

9 But this concept of look, if we tweak SAMs and we
10 transfer him and just when he gets to the top of the hill
11 we're going to tweak it and he's got to start the whole thing
12 over again is indicative of this moving target that goes
13 nowhere.

14 THE COURT: All right. So the bottom line is that
15 there has not since he's been in New York been a complete
16 exhaustion of the administrative remedies?

17 MR. HOEY: I think we'd like to put some evidence on
18 to that effect, Your Honor, and I would -- I think the answer
19 is yes, quite frankly, that he has exhausted those.

20 THE COURT: Well, tell me what he did. Did it go
21 all the way to the end of the line?

22 MR. HOEY: Under -- under 542.10, Your Honor, 13, 14
23 and 15, he first starts with what's called an informal request
24 to staff.

25 THE COURT: That's right, the informal request to

1 staff, then to the Warden --

2 MR. HOEY: Under a BP-9.

3 THE COURT: -- then to the Regional Director, then
4 to General Counsel. Did you go that --

5 MR. HOEY: Yeah, if I could confer with my --

6 THE COURT: -- did you go that route? If you went
7 that route that's one thing. If you didn't go that route,
8 it's quite another.

9 MR. HOEY: If I could stand down, Your Honor, I want
10 to just make sure I'm speaking correctly on what -- because
11 there are so many filings in the case, because he has been in
12 several different facilities, I think it's important for me to
13 get the facts straight, Judge.

14 THE COURT: I think it is too.

15 MR. HOEY: Yes. May I have a moment, Your Honor?

16 THE COURT: Certainly.

17 (Off the record)

18 (Recording turned on after counsel starts speaking)

19 MR. HOEY: -- deps taken and we have some documents
20 to support it. While he's at MCC, New York, Your Honor, he
21 filed the BP-8, which was ultimately denied. He then filed an
22 administrative remedy to the Warden. He did not receive his
23 response from the Warden denying his request within the 20
24 days that he needed to file the appeal to the next level which
25 would be the Regional Director under a BP-10, therefore,

1 because they're holding his mail for a period of time that's
2 extended at MCC New York, he's not getting the mail in a
3 timely fashion and he's not able to appropriately and timely
4 appeal any adverse decision, and that -- that is actually
5 confirmed by what was taking place in Colorado.

6 He filed a Bivens action in Colorado and requested
7 of the Court leave to proceed in forma pauperis. When he made
8 that request he submitted his financial picture to the Court
9 to support his in forma pauperis petition. He received from
10 the Court ten days too late the permission to do that and
11 unfortunately, the order that granted him permission to
12 proceed in forma pauperis was time sensitive.

13 Because he received it late, he could not in time
14 file the necessary paperwork and pay the necessary fees and
15 ultimately his Bivens action was dismissed. That's just
16 illustrating how the time sensitive materials that he's
17 getting and not getting in time quite frankly is hampering his
18 ability to pursue the process appropriately.

19 So the short answer is no, he has not exhausted the
20 administrative remedies in New York. The long answer is
21 there's a reason and that's because the time sensitive
22 materials he's supposed to be getting in time aren't getting
23 to him in time, so I think that -- that would be the answer to
24 that, Your Honor.

25 I think there's also the way I see it possibly some

1 confusion between the PLRA requirements and the requirements
2 necessary to file a direct motion in the criminal case such as
3 what we've done here. The cases that are cited by the
4 Government are very -- it's a very important distinction, Your
5 Honor. The Lyons case, Yousef versus Reno, and Nagy are all
6 cases that were originally filings undertaken by the defendant
7 -- the prisoner that is, under the Bivens Act, under the
8 Bivens case, Your Honor.

9 These were civil suits filed in a separate Court
10 with a separate Judge, thus implicating the judicial economy
11 concept. But for instance, Nagy is a case where the
12 Government says you know, Judge, you should rely on this
13 holding. In Nagy, the Second Circuit, which would have an
14 impact on Hashmi and the other matter that we discussed, the
15 Basciano case -- Nagy rectifies all this.

16 Nagy doesn't rectify anything. Nagy -- in Nagy, the
17 defendant filed a writ of mandamus simply seeking to get an
18 answer about recusing his Trial Judge. He filed it under --
19 couched it in a Bivens complaint which was ultimately
20 dismissed because the Court there said he didn't exhaust his
21 remedies and this particular request wasn't a Bivens type of
22 request.

23 Nowhere in that case does it say any defendant in
24 any criminal case cannot file a direct complaint in a motion
25 in the criminal case unless he's exhausted his remedies. It

1 doesn't say that at all. The only controlling cases that deal
2 with this concept directly are those that we've cited in our
3 brief. Hashmi is right on point, Basciano is right on point.
4 I think there is a very clear distinction between a prisoner's
5 Litigation Reform Act case filed under Bivens in a civil case
6 -- civil setting, versus a criminal defendant raising this
7 issue directly within his case.

8 I think the primary bottom line is the judicial
9 economy argument. Most of the Courts agree with that. I
10 think finally, Your Honor, in the Yousef case cited by the
11 Government, the Court in that case says the Bureau of Prisons
12 does not have authority to modify SAMs. They recognize that
13 so why would an administrative remedy procedure be relevant?

14 THE COURT: All right. Mr. Hoey, I'll take a look
15 at that issue and we'll deal with it ultimately.

16 MR. HOEY: Yes, Your Honor.

17 THE COURT: I think at this juncture we ought to
18 move forward and get into the issues that you've raised in the
19 petition that was filed, specifically the First Amendment --
20 the Sixth Amendment issues and the other issues that you have
21 raised.

22 MR. HOEY: Yes, Your Honor. May I confer with
23 counsel a moment?

24 THE COURT: Yes, indeed.

25 (Pause in proceedings)

1 MR. HOEY: May we see you at sidebar, Judge?

2 THE COURT: Certainly.

3 (Sidebar discussion as follows:)

4 MR. HOEY: Your Honor, I would ask the Court allow
5 us to break for today based on our telephone conference of
6 last week where we discussed kind of the issues that you
7 wanted to hear today.

8 My thought was that today was designed specifically
9 to determine whether or not this Court would hear the
10 substantive element of the petition, whether it was in a
11 position to do so and legally if it could and whether there's
12 been enough evidence on the record or through the briefs or
13 through argument that would allow -- you know, convince the
14 Court one way or the other. We were not prepared to put the
15 substantive element of the case on today.

16 THE COURT: Ms. Sykes, was that your understanding
17 as well?

18 MS. SYKES: Yes, Your Honor, that we would take this
19 sort of as phase one and determine whether or not there was an
20 exhaustion.

21 THE COURT: Well, we need to get to phase two very
22 quickly. There's no question about that.

23 MR. TROYER: Indeed. And one of the issues that
24 comes up is that I know Mr. -- I know it's Mr. Hoey's stated
25 the intent to have an evidentiary hearing where he'll call

1 witnesses. It's the Government's position and in that
2 conference call we made it rather clear that it's our position
3 that there's no need to call a lot of witnesses, that there's
4 plenty of submissions, there's plenty of a record for the
5 Court to make a determination, and that it's not necessary to
6 have live testimony and a full evidentiary hearing.

7 MR. HOEY: We may reach that conclusion. I mean, we
8 may reach that conclusion, Judge. I don't think we're ready
9 to do that today. We're certainly going to have to confer
10 with Mr. Savage on that. I don't want to in any way affect
11 his desire to testify if he wants to and put these things into
12 the record himself.

13 Of course he -- you know, we understand the exposure
14 element of that but if we could somehow reach an agreement by
15 way of stipulations or submissions to the Court that would
16 present this to you in a package as opposed to a full day of
17 testimony or what have you, that might be a better way.

18 THE COURT: Well, I certainly will permit you to
19 talk with the US Attorney and determine what you are able to
20 do with regard to the situation. Getting back to the issue
21 that is before the Court, is there any -- I kind of cut you
22 off and to move forward, the question I have is do you have
23 anything else --

24 (Sidebar interrupted)

25 PERSON IN GALLERY: I think something's wrong with

1 my brother. Somebody check him. Get medical attention.

2 Something's wrong. Something's not right. I know him.

3 Something's not right. Give him medical attention. Listen --

4 you're not listening to me. I know he needs medical

5 attention.

6 MR. SULLIVAN: Your Honor, can we have permission to
7 have Mr. Savage taken back for medical reasons?

8 THE COURT: Certainly.

9 MR. SULLIVAN: Do you want some water? Here's some
10 water.

11 MR. HOEY: Yeah, he's sweating pretty bad. He's
12 sweating.

13 MR. SULLIVAN: Yeah.

14 MR. HOEY: Are you all right?

15 MR. SULLIVAN: No, he's not breathing right either.

16 MR. HOEY: Pull him back from the table.

17 MR. SULLIVAN: Can you hear me?

18 THE DEFENDANT: What? I can hear you.

19 MR. HOEY: Are you all right?

20 THE DEFENDANT: I'm all right.

21 MR. HOEY: Why don't you just go back for a second
22 and --

23 THE DEFENDANT: I'm all right. I'm all right.

24 THE COURT: Mr. Hoey and Mr. Sullivan, we're going
25 to recess --

1 THE DEFENDANT: No, go ahead, I'm all right.

2 THE COURT: Mr. Savage, we'll give you a couple of
3 minutes.

4 MR. HOEY: He's like sweating profusely.

5 THE COURT: We can take a recess. It's no
6 imposition.

7 MR. HOEY: He's not breathing right.

8 THE COURT: We'll reconvene in ten minutes, okay?

9 MR. SULLIVAN: Thank you, Your Honor.

10 THE DEFENDANT: I'm all right.

11 (Recess taken, 3:52 p.m. to 4:16 p.m.)

12 THE COURT: All right, Mr. Hoey and Mr. Sullivan,
13 are we in a position to go forward?

14 MR. HOEY: We are, Your Honor.

15 THE COURT: All right.

16 MR. HOEY: I have provided the Government a copy of
17 each of the exhibits I intend to submit today. There will no
18 live testimony, but we would admit several documents into the
19 record. Counsel has those. We'd ask the Court to consider
20 them in making a decision on this first issue that we
21 presented to the Court today.

22 THE COURT: All right. Mr. Troyer, do you have
23 anything further?

24 MR. TROYER: Well, I certainly have no objection to
25 what counsel has shared with us and what he expects to

1 present. The Government will also place -- we have a package
2 from the -- request for administrative remedy and the
3 documents that came from that including the last document
4 which is the response to the request from Warden Suzanne R.
5 Hastings of MCC New York dated June 15th, 2010. I've given a
6 copy of that to counsel and so the Government will submit that
7 as well.

8 I also have -- I also have an email from Mr. Haas to
9 Ms. Sykes and myself with a number of people CC'd on this
10 concerning the issue of the legal mail dated September 28th,
11 2010.

12 THE COURT: Why don't you give the exhibits -- both
13 of you, Mr. Hoey and Mr. Troyer, give the exhibits to Mr.
14 Finney. You can mark the exhibits Government's exhibits and
15 defendant's exhibits.

16 MR. HOEY: Judge, I have had an opportunity to
17 review those exhibits and documents. I have no objection to
18 the Court receiving them and reviewing them.

19 THE COURT: All right. And have you given your
20 documents to Mr. Finney to mark?

21 MR. HOEY: I haven't, Your Honor.

22 THE COURT: All right.

23 MR. HOEY: May I identify those on the record?

24 THE COURT: Yes, indeed.

25 MR. HOEY: Your Honor, Defense Exhibit 1 would be a

1 two page document dated February 9 of 2007 notifying Mr.
2 Savage of the imposition of SAMs while he was an inmate at USP
3 Atlanta. Exhibit 2 would be the June 23, 2008 notification of
4 modification of SAMs and renewal notice as well. Exhibit 3 is
5 the May 15th, 2009 notification of extension of SAMs.

6 Exhibit 4 is the February 1, 2010 notification of
7 extension of SAMs. Number 5 is an admission and orientation
8 packet received by Mr. Savage upon his arriving at the
9 Metropolitan Correctional Center. The next exhibit is a two
10 page request for administrative remedy form that Mr. Savage
11 submitted to the Warden here at the Federal Detention Center
12 on August 26th, 2004.

13 THE COURT: That's D-6.

14 MR. HOEY: Yes, Your Honor.

15 THE COURT: All right.

16 MR. HOEY: Number 7 is the habeas corpus petition
17 filed by Mr. Savage in Atlanta. Exhibit 8 is a Central Office
18 administrative remedy appeal filed by Mr. Savage in ADX
19 Colorado, along with page two, which is the July 7th, 2008
20 order from Harold Watts, Administrator of the National Inmate
21 Appeals Unit.

22 The next document is a package of material, Your
23 Honor, which is essentially Mr. Savage's civil action that he
24 filed in United States District Court for the District of
25 Colorado, along with his petition to proceed in forma pauperis

1 and an order dismissing the civil action for failure to comply
2 with the in forma pauperis order. The final exhibit is the
3 single page document -- the request for administrative remedy
4 filed by Mr. Savage in MCC New York, Your Honor.

5 THE COURT: All right, they're admitted. All right,
6 anything further, counsel?

7 MR. HOEY: Nothing, Your Honor.

8 MR. TROYER: No, Your Honor.

9 THE COURT: All right. I will take a look at the
10 record and we'll hand down an appropriate decision.

11 Mr. Finney, would you please speak with Mr. Hoey,
12 Mr. Sullivan and Mr. Troyer and Ms. Sykes and get a date for
13 another hearing in this matter? We need to address some
14 things and it should be done within the next two weeks.

15 COURTROOM DEPUTY: I will, Judge.

16 THE COURT: All right? All right, recess.

17 (Proceedings concluded, 4:22 a.m.)

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C E R T I F I C A T I O N

I, Diane Gallagher, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

_____ October 5, 2010

DIANE GALLAGHER

DIANA DOMAN TRANSCRIBING